86-1568

IN THE

Supreme Court of the United States

OCTOBER TERM, 1987

No.

HAROLD J. ROMAIN,
Petitioner,

vs.

ADMIRAL HAROLD SHEAR, Administrator of the DEPARTMENT OF TRANSPORTATION, MARITIME ADMINISTRATION,
Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

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QUESTIONS PRESENTED FOR REVIEW

1. Did the court below err in holding that the Secretary of the Department is the only proper defendant in an action arising under the Age Discrimination in Employment Act of 1967, 29 U.S.C. § 621 *et seq.*?

2. Whether petitioner's claim must be barred unless the Secretary of the Department is named and served within the thirty day statute of limitations for appeals from Merit Systems Protection Board decisions.

3. Whether the Ninth Circuit's strict reading of Rule 15(c) bars plaintiff's claim, where the "proper" defendant had notice in light of its identity of interests and/or close association with the original defendant.

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TABLE OF CASES

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Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

Petitioner prays that a writ of certiorari issue to review the decision of the United States Court of Appeals for the Ninth Circuit.

OPINION BELOW

The opinion of the Court of Appeals for the Ninth Circuit is reported at ____ F.2d ____ (9th Cir. 1986). A copy of the opinion appears in the Appendix at A-1 through A-11. The order of the district court appears in the Appendix at B-1 through B-17.

JURISDICTION

The opinion of the Court of Appeals for the Ninth Circuit issued on September 19, 1986. (Appendix A) A timely

petition for rehearing was denied on December 3, 1986. (Appendix C). The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(a).

STATUTES INVOLVED

Section 15 of the Age Discrimination in Employment Act of 1967, 5 U.S.C. § 633a provides as follows:

> (c) Any person agrieved may bring a civil action in any Federal district court of competent jurisdiction for such legal or equitable relief as will effectuate the purposes of this Act.
>
> (d) When the individual has not filed a complaint concerning age discrimination with the Commission, no civil action may be commenced by any individual under this section until the individual has given the Commission not less than thirty days' notice of an intent to file such action. Such notice shall be filed within one hundred and eighty days after the alleged unlawful practice occurred. Upon receiving a notice of intent to sue, the Commission shall promptly notify all persons named therein as prospective defendants in the action and take any appropriate action to assure the elimination of any unlawful practice.

Section 7703(b)(1) of the Civil Service Reform Act of 1978, 5 U.S.C. § 7703, provides as follows:

> (1) Except as provided in Paragraph (2) of this subsection, a petition to review a final order or final decision of the Board shall be filed in the Court of Claims of a United States court of appeals as provided in Chapters 91 and 158, respectively, of Title 28. Notwithstanding any other provision of law, any petition for review must be filed within 30 days after the date the petitioner received notice of the final order or decision of the Board.
>
> (2) Cases of discrimination subject to the provisions of Section 7702 of this title shall be filed under Section 717(c) of the Civil Rights Act of 1964 (42 U.S.C. 2000e-16(c), Section 15(c) of the Age Discrimination in Employment Act of 1967 (29 U.S.C. 633a(c)) and Section 16(b)

of the Fair Labor Standards Act of 1938, as amended (29 U.S.C. 216(b)), as applicable. Notwithstanding any other provision of law, any such case filed under any such section must be filed within 30 days after the date the individual filing the case received notice of the judicially reviewable action under such Section 7702.

Section 15(c) of the Federal Rules of Civil Procedure provides as follows:

> Whenever the claim or defense asserted in the amended pleading arose out of the conduct, transaction, or occurrence set forth or attempted to be set forth in the original pleading, the amendment relates back to the date of the original pleading. An amendment changing the party against whom a claim is asserted relates back if the foregoing provision is satisfied and, within the period provided by law for commencing the action against him, the party to be brought in by amendment (1) has received such notice of the institution of the action that he will not be prejudiced in maintaining his defense on the merits, and (2) knew or should have known that, but for a mistake concerning the identity of the proper party, the action would have been brought against him.
>
> The delivery or mailing of process to the United States Attorney, or his designees, or the Attorney General of the United States, or an agency or officer who would have been a proper defendant if named, satisfies the requirement of clauses (1) and (2) hereof with respect to the United States or any agency or officer thereof to be brought into the action as a defendant.

STATEMENT OF THE CASE

Petitioner, Harold J. Romain, was employed by the Department of Transportation, Maritime Administration, Western Region, as a Supervisory Trade Specialist in the San Francisco Regional Office from October 14, 1973 until his separation by reduction-in-force (hereafter "RIF") on September 30, 1983. Petitioner was sixty-one years of age at that time and qualified for his position.

All four Marketing Development and Port positions in the San Francisco Regional Office, including petitioner's position, were abolished as part of an agency reorganization. A new Maritime Administration Office was opened in Portland, Oregon, in February 1983. An employee from the San Francisco office, younger than petitioner, was assigned to be the Supervisory Trade Specialist in Portland. Petitioner was not offered that position.

On October 20, 1983, petitioner appealed the RIF to the Merit Systems Protection Board (hereafter "MSPB"), alleging violations of federal law and regulations. He also alleged that the justification for the reorganization was a pretext for age discrimination in violation of the Age Discrimination in Employment Act. The MSPB upheld the decision and concluded that plaintiff had not established discrimination.

After the initial MSPB decision, the agency decided to create a part-time market development consultant in San Francisco to perform the tasks previously conducted by petitioner in his capacity as a Supervisory Trade Specialist. Petitioner filed a timely petition for review, claiming a new violation of his rights under the Age Discrimination in Employment Act, since he would be given none of the benefits he was entitled to as a career civil servant. He also argued that the creation of consultant position contradicted the agency's assertion that petitioner's separation was a business necessity.

On May 25, 1984, the MSPB issued a final decision rejecting petitioner's petition. Petitioner filed a timely action in the Northern District of California on June 29, 1984, which named Admiral Harold Shear, in his official capacity as the Administrator of the Department of Commerce Maritime Administration, as defendant.[1] On July 2, 1984, the complaint was

[1] Four claims were plead in petitioner's complaint:

(1) age discrimination against him individually in violation of the Age Discrimination in Employment Act;

(2) age discrimination in the Maritime Administration's employment practices against older employees;

(3) violation of the Merchant Marine Act by failing to maintain a viable marketing development program; and

(4) violation of the Civil Service Reform Act by effecting a reorganization that was not bona fide.

served by mail on Admiral Harold Shear as well as Peter J. Hannums, the attorney who represented the Department of Transportation at the MSPB hearing. A copy of the complaint was served on the United States Attorney General by certified mail and an Assistant United States Attorney by personal service on August 13, 1984.

The district court dismissed claims one, two and four for failure to file an action naming the proper defendant within the thirty-day statutory period, dismissed claim three for failure to state a claim and granted defendant's motion for summary judgment on claim four.[2]

Petitioner filed a motion for reconsideration which sought to name the Secretary of the Department as defendant and have the amendment relate back to the date of the initial complaint. The district court denied the motion on the ground that the Secretary of the Department had not had notice of the suit within the 30 day period. The government made no claim that prejudice would result if the Secretary of the Department were added.

The court of appeals for the Ninth Circuit affirmed the district court's decision on September 19, 1986.

REASONS FOR GRANTING THE WRIT

The issues raised in this case are of great importance to federal employees seeking to enforce their rights under the Age Discrimination in Employment Act of 1967, 29 U.S.C. § 621 (hereafter "ADEA") and the Civil Service Reform Act of 1978, 5 U.S.C. § 7703 (hereafter "CSRA"). In the legislative history of the CSRA, Congress made clear that:

> If a suit is brought in district court, the rules of equity provide that minor procedural irregularities in the administrative process for which the employee is responsible should not predetermine the outcome of the case.

Legislative History of the Federal Service Labor-Management Relations Statute, Title VII of the Civil Service Reform Act of

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[2] Defendant did not submit the MSPB administrative record in support of his motion for the court to review.

1978, H.R. Conf. Rep. 9501717, 95th Cong. 2nd Session, at 810.

PERSONS OTHER THAN THE HEAD OF THE DEPARTMENT MAY BE NAMED AS DEFENDANT IN ADEA ACTIONS AGAINST FEDERAL OFFICIALS.

The ADEA does not specify who should be named as defendant. However, the plain language of the Age Discrimination in Employment Act of 1967 which covers nondiscrimination on account of age in federal government employment refers to "defendants" in the plural. 29 U.S.C. § 633(d).[3]

The court of appeals erred in affirming the dismissal of petitioner's claims for failing to name the Secretary of the Department. The express provisions of the ADEA conflict with the requirement of the Civil Rights Act of 1964, 42 U.S.C. § 2000e-16(c) that "the head of the department, agency, or unit, as appropriate" must be named as defendant.[4]

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[3] The decision of the Ninth Circuit that this error is jurisdictional is not followed by the Seventh Circuit, which granted leave to amend the complaint to name the proper defendant in ADEA cases against the federal government. *Ellis* v. *United States Postal Service; 784 F.2d 835, 40 FEP Cases 318 (7th Cir. 1986)*. Accord, *Gillispie* v. *Helms*, 559 F. Supp. 40, 31 FEP Cases 40 (W.D. Mo. 1983); *Bechtel* v. *United States Office of Personnel Management*, 549 F. Supp. 111, 31 FEP Cases 743 (N.D. Ga. 1983).

[4] The ADEA does not encorporate the "remedies, procedures and rights" contained in the Civil Rights Act of 1964, unlike the Rehabilitation Act of 1973, 29 U.S.C. § 791, as amended in 1978 by section 794a. In fact, the ADEA encorporates the enforcement provisions of the Fair Labor Standards Act of 1938, 29 U.S.C. § 216 and § 217 in Section 7, 29 U.S.C. § 626(b). There are numerous differences in the procedures and remedies available under the ADEA, compared to the Civil Rights Act of 1964 and the Rehabilitation Act of 1973, as amended.

PETITIONER MAY AMEND HIS COMPLAINT TO NAME THE "PROPER" DEFENDANT UNDER THE RELATION BACK DOCTRINE IN FEDERAL RULE OF PROCEDURE RULE 15(c) WHEN THE ORIGINAL DEFENDANT HAS AN IDENTIFY OF INTERESTS OR CLOSE ASSOCIATION WITH "PROPER" DEFENDANT.

The Supreme Court has noted that the circuit courts disagree on the proper application of Rule 15(c). *Schiavone et. al* v. *Fortune, aka Time, Incorporated,* 54 LW 4692 (decided June 18, 1986).[5] The court left open the question whether the strict reading of "relation back doctrine" also applies to employment discrimination cases against government officers, where the government was on notice of the claim within the period of limitations. *Schiavone, supra* at note 8, citing *Korn* v. *Royal Caribbean Cruise Line,* 724 F.2d 1397 (9th Cir. 1984) with approval.

The government had notice of petitioner's claims due to the requirement that federal employees exhaust administrative remedies prior to bringing an action. Since the petitioner was required to file an appeal to the MSPB within twenty days of the removal, respondent had an opportunity to investigate the facts giving rise to petitioner's claims before they became stale. A full administrative hearing was held in which petitioner was cross examined by an attorney representing the Department. Moreover, the government did not claim that prejudice would result if the Secretary was added as a defendant.

This case falls within the "identity of interest" exception under which an amendment that substitutes a party in a complaint after the limitations period has expired will relate back to the date of the filing on the original complaint.

Needless procedural barriers, (such as reading Rule 15(c) to require that the proper defendant be named *and served*

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[5] Compare, *Cooper* v. *United States Postal Service,* 740 F.2d 714, 35 FEP Cases 364 (9th Cir. 1984), cert. denied, 471 U.S. _____ (1985); *Hale* v. *United States Postal Service,* 41 FEP Cases 1601 (N.D. Ill. 1986); *Hughes* v. *United States,* 701 F.2d 56 (7th Cir. 1982) with *Dodson* v. *U.S. Army,* 41 FEP Cases 212 (S D Ind 1986); *Royall* v. *United States Postal Service,* 41 FEP Cases 311 (ED NY 1985) *Gonzoles* v. *Department of the Air Force,* 40 FEP Cases 1689 (N D Tex 1986).

within the thirty day period) deprives many federal employees of the right to enforce the employment discrimination laws. This burden is particularly onerous in light of the extremely short statute of limitations for federal employee discrimination claims (thirty days) and the relatively long time to file an answer given to federal officers named as defendants (sixty days).

CONCLUSION

On the basis of the foregoing it is respectfully requested that this court issue a writ of certiorari to review the opinion of the Ninth Circuit.

Dated this 9th day of February, 1987.

Respectfully submitted,

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APPENDICES

APPENDIX A

UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

HAROLD J. ROMAIN,
Plaintiff-Appellant,

vs.

ADMIRAL HAROLD SHEAR, Administrator of the DEPARTMENT OF TRANSPORTATION, MARITIME ADMINISTRATION,
Defendant-Appellee.

No. 85-2421

D.C. No. C 84-4423 WWS

OPINION

Appeal from the United States District Court for the Northern District of California
Hon. William W. Schwarzer, District Judge, Presiding
Argued and Submitted July 17, 1986—San Francisco, CA

BEFORE: BROWNING, Chief Judge, FLETCHER and HALL, Circuit Judges.

PER CURIAM:

Plaintiff Harold Romain appeals the district court's dismissal of three of his four claims and the district court's grant of summary judgment for defendant on the fourth claim. We affirm.

BACKGROUND

Romain was employed by the Department of Transportation's Maritime Administration (MARAD) in the San Francisco regional office. On September 30, 1983, Romain lost his job through a reduction-in-force (RIF). Romain appealed to the Merit Systems Protection Board (MSPB), and the MSPB presiding official affirmed the agency action. Romain then petitioned the full Board for review; the Board denied the petition. Romain received the MSPB's final order on May 30, 1984, and on June 29, 1984, he filed a complaint in district court.

Romain asserted four claims in his complaint: (1) age discrimination against Romain individually, in violation of the Age Discrimination in Employment Act (ADEA), by virtue of abolishing his position; (2) age discrimination in MARAD's employment practices against older employees in general; (3) violation of the Merchant Marine Act by failing to maintain a viable marketing development program; and (4) violation of the Civil Service Reform Act by effecting a reorganization that was not bona fide. The district court dismissed claims one and two for failure to file an action naming the proper defendant within the thirty-day statutory period, and dismissed claim three for failure to state a claim, concluding that the Merchant Marine Act does not provide a private right of action. The court found that as to claim four, Romain failed to name the correct defendant within the statutory period, and that even ignoring this jurisdictional problem, defendant Shear was entitled to summary judgment on the merits. Romain timely appeals.

DISCUSSION

I. Age Discrimination Claims

Romain received the MSPB's final decision rejecting his petition for review on May 30, 1984. Title 5 U.S.C. § 7703, governing judicial review of decisions of the MSPB, requires that discrimination claims be filed within thirty days after

receipt of notice of the judicially reviewable action. 5 U.S.C. § 7703(b)(2). Romain complied with the timing requirement by filing his complaint in district court on June 29, 1984.

The ADEA does not specify who should be named as defendant in an age discrimination action. However, reference to Title VII of the Civil Rights Act of 1964 provides guidance.

Section 717 of Title VII, 42 U.S.C. § 2000e-16, states that in a Title VII discrimination action, "the head of the department, agency, or unit, as appropriate, shall be the defendant." 42 U.S.C. § 2000e-16(c). The terms "department," "agency," and "unit" are further defined in § 2000e-16(a); "agency" refers to one of the "executive agencies as defined in section 105 of Title 5." Title 5 U.S.C. § 105 in turn states that " 'Executive agency' means an Executive department, a Government corporation, [or] an independent establishment," and 5 U.S.C. § 101 defines "Executive department" as one of the thirteen cabinet-level departments, including the Department of Transportation. Title VII thus requires that in a suit such as Romain's, the Secretary of Transportation be named as the defendant.

Section 15 of the ADEA, 29 U.S.C. § 633a, enacted in 1974 to prohibit age discrimination in federal employment, was patterned after § 717 of Title VII, 42 U.S.C. § 2000e-16. *See Lehman v. Nakshian,* 453 U.S. 156, 166-67 & n.15 (1981). When a provision of the ADEA can be traced to a complimentary section of Title VII, the two should be construed consistently. *Oscar Mayer & Co. v. Evans,* 441 U.S. 750, 756 (1979). Other courts, including the Seventh Circuit, have held that § 2000e-16(c)'s identification of the proper defendant applies to ADEA claims. *See, e.g. Ellis v. United States Postal Service,* 784 F.2d 835, 838 (7th Cir. 1986); *Gillispie v. Helms,* 559 F. Supp. 40, 41-42 (W.D. Mo. 1983). We agree with the reasoning of these cases and hold that 42 U.S.C. § 2000e-16(c), identifying the proper defendant in Title VII discrimination actions, also applies to age discrimination claims brought under the ADEA.

Romain thus should have named the Secretary of Transportation as the defendant in his ADEA claims. Romain

incorrectly named Harold Shear, Administrator of MARAD, as defendant.

Romain contends that he should be permitted to amend his complaint under Fed. R. Civ. P. 15 to name the proper defendant. Rule 15(c) provides:

> *Relation Back of Amendments.* Whenever the claim or defense asserted in the amended pleading arose out of the conduct, transaction, or occurrence set forth or attempted to be set forth in the original pleading, the amendment relates back to the date of the original pleading. An amendment changing the party against whom a claim is asserted relates back if the foregoing provision is safisfied *and, within the period provided by law for commencing the action against him, the party to be brought in by amendment (1) has received such notice of the institution of the action that he will not be prejudiced in maintaining his defense on the merits,* and (2) knew or should have known that, but for a mistake concerning the identity of the proper party, the action would have been brought against him.
>
> The delivery or mailing of process to the United States Attorney, or his designee, or the Attorney General of the United States, or an agency or officer who would have been a proper defendant if named, satisfies the requirement of clauses (1) and (2) hereof with respect to the United States or any agency or officer thereof to be brought into the action as a defendant.

(Emphasis added.) At issue here is the underscored provision requiring that a newly named defendant receive notice of the suit within the statutory period for commencing the action.

In the case at bar, the Secretary of Transportation did not receive notice of the action within the thirty-day period following Romain's receipt of the MSPB's decision, i.e., by June 29, 1984. In fact, no government official or entity was served within the thirty-day period. Romain's failure to name the proper defendant thus could not be remedied by a Rule 15 amendment. *See Schiavone v. Fortune,* 106 S. Ct 2379, ____ (1986); *Cooper v. U.S. Postal Service,* 740 F.2d 714, 716 (9th Cir. 1984), *cert. denied,* 105 S. Ct. 2034 (1985).

On appeal, Romain argues for the first time that the 180-day period of 29 U.S.C. § 633a(d), rather than the thirty-day period of 5 U.S.C. § 7703(b)(2), applies to his case. Section 633a(d), part of the ADEA, provides in part:

> When the individual has not filed a complaint concerning age discrimination with the Commission, no civil action may be commenced by any individual under this section until the individual has given the Commission not less than thirty days' notice of an intent to file such action. Such notice shall be filed within one hundred and eighty days after the alleged unlawful practice occurred.

By its terms, this provision applies when the individual has *not* pursued an administrative remedy through the EEOC. Discrimination complaints are normally pursued through the EEOC. Romain was able to pursue his complaint through the MSPB because his was a "mixed case" involving an adverse action normally appealable to the MSPB *and* an allegation that a basis for the action was discrimination. *See* 5 U.S.C. § 7702(a). In a case such as Romain's, § 663a(d) would apply only if Romain had not pursued an administrative remedy through the MSPB.

Romain attempts to avoid this problem by contending that although he pursued his initial complaint through the MSPB, his employer later committed "a new and separate violation of the [ADEA]...: after the MSPB hearing, appellee took various steps to create a new part-time non-Civil Service consultant position to perform most of appellant's duties." Romain raised this new violation in his petition for review filed with the MSPB. Romain contends that "[this] new violation was not taken through administrative channels—appellant went directly into federal district court after the MSPB denied the petition for review."

Romain never presented this argument before the district court; 29 U.S.C. § 633a(d) is never mentioned in district court papers. In documents filed in the district court Romain argued that (1) Shear was in fact the correct defendant, or (2) the proper defendant received notice within the thirty-day period. In his Rule 60(b) motion before the district court, Romain

stated: "It must be remembered that this action was brought under 5 U.S.C. § 7702 which requires that a *de novo* action be brought within thirty days of receipt of the MSPB decision."

This court will generally not consider an issue raised for the first time on appeal. *Bolker v. Commissioner,* 760 F.2d 1039, 1042 (9th Cir. 1985). Three exceptions to this rule exist: (1) in an "exceptional" case when review is necessary to prevent a miscarriage of justice or to preserve the integrity of the judicial process, (2) when a new issue arises while appeal is pending because of a change in law, or (3) when the issue is purely one of law and the necessary facts are fully developed. *Id.*

None of these exceptions avails Romain. There is nothing "exceptional" about his case, and no laws have changed pending appeal. The facts relevant to this question are not fully developed: the district court made no findings as to whether Romain's claim regarding creation of the new consultant position constituted a new claim separate from the claim previously pursued through the MSPB, or as to whether the petition for review filed with the MSPB satisfied the requirement of § 633a(d) that a notice of intent to sue be given. We therefore decline to consider Romain's argument that the 180-day period of § 633a(d) applies to this case.

II. Merchant Marine Act Claim

In the third claim of his complaint, Romain alleges that "[t]he defendant has unlawfully failed to maintain the marketing program in the San Francisco Regional Office in violation of the Merchant Marine Act of 1934, 46 U.S.C. 1101, as amended by 46 U.S.C. 1213." As the district court observed in its initial order, § 1101 is a declaration of policy and creates no enforceable legal rights. Section 1213(b) provides for the establishment of a least one MARAD regional office in each of the four "port ranges," but imposes no requirement as to a regional office in San Francisco. Furthermore, these provisions do not create a private right of action. *See Cort v. Ash,* 422 U.S. 66, 78 (1975). The district court thus properly held that Romain failed to state a claim upon which relief could be granted.

On appeal, Romain contends that he brought his Merchant Marine Act claim under a provision of the Civil Service Reform Act that permits a court to set aside MSPB action that is "not in accordance with law." *See* 5 U.S.C. § 7703(c)(2).[1] Under this jurisdictional basis, Romain again failed to name the proper defendant within the thirty-day statutory period. Section 7703(a)(2) provides that in such an action, "the agency responsible for taking the action appealed to the Board shall be the named respondent." The Department of Transportation was thus the proper defendant. Any attempt by Romain to amend his complaint to name the proper defendant would fail because Rule 15(c)'s relation-back test would not be satisfied. *See supra* pp. 4-5.

Even if Romain could surmount this jurisdictional hurdle, dismissal for failure to state a claim would be proper. As observed above, 46 U.S.C. § 1101 contains only a declaration of policy. Section 1213(b) requires establishment and maintenance of "such regional offices as may be necessary, including but not limited to, one such office for each of the four port ranges." It further provides that the regional offices "shall carry out appropriate functions, activities, and programs of the Maritime Administration." Neither § 1101 nor § 1213(b) mentions marketing programs or requires maintenance of a San Francisco office. Construing the complaint in the light most favorable to Romain, there is no set of facts on which he could prevail, and dismissal for failure to state a claim was proper.

III. Civil Service Reform Act Claim

Romain's fourth claim states that "[t]he defendant has violated the requirement of the Civil Service Reform Act of 1978 that an agency reorganization be bona fide." Romain labels as "pretextual" the agency's statement that the RIF was carried out pursuant to a legitimate reorganization.

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[1] Section 7703(c), by its terms, applies to cases filed in the Court of Appeals for the Federal Circuit. *See* 5 U.S.C. §7703(c). This is because petitions for review of MSPB actions that do not contain discrimination claims must be filed in the Court of Appeals for the Federal Circuit. *See id.* §7703(b)(1); *Tolliver v. Deniro*, 790 F.2d 1394, 1395 (9th Cir. 1986). But if the action is a "mixed case" also involving a discrimination claim, the case is to be filed in the district court under the applicable discrimination statute, and the district court has jurisdiction to hear the entire claim. *See* 5 U.S.C. §7703(b)(2); *Tolliver*, 790 F.2d at 1395.

Once again, Romain failed to name the proper defendant within the thirty-day statutory period. As discussed above, the proper defendant under 5 U.S.C. § 7703(a)(2) is the agency, here the Department of Transportation.

The district court noted this jurisdictional defect, but held that even if Romain could amend his complaint, summary judgment would be proper. We agree.

A. Standard of Review

Romain strenuously argues that he is entitled to de novo judicial review of his nondiscrimination claim, but he is mistaken. Ordinarily, petitions for judicial review of MSPB action are filed in the Court of Appeals for the Federal Circuit and are reviewed on the administrative record. 5 U.S.C. §§ 7703(b)(1), 7701(c)(1)-(3). Where a claim of discrimination is coupled with a nondiscrimination claim, however, the entire "mixed case" is filed in the district court. *Id.* § 7703(b)(2); 29 U.S.C. § 633a(c); *see also Tolliver,* 790 F.2d at 1395. On the discrimination claim, the petitioner "shall have the right to have the facts subject to trial de novo by the reviewing court." 5 U.S.C. § 7703(c). The nondiscrimination claim in a mixed case is, however, reviewed on the administrative record under § 7703(c)(1)-(3). *Hayes* v. *United States Government Printing Office,* 684 F.2d 137, 141 (D.C. Cir. 1982) ("Hayes may bring his entire mixed case before the district court for review *de novo* of the discrimination claim, and review on the record of his nondiscrimination claim."); *Swann* v. *Walters,* 620 F. Supp. 741, 744 (D.D.C. 1984) (same); *Thompson* v. *United States Postal Service,* 596 F. Supp. 628, 631 (W.D. Va. 1984) (in considering the nondiscrimination portion of a mixed case, court reviewed claim on the administrative record following § 7703(c)(1)-(3)). The district court properly followed this principle in denying de novo review of the nondiscrimination claim.

B. Merits

The MSPB concluded that MARAD had a legitimate basis for the RIF. The district court concluded that "[n]othing before the Court suggests that the [MSPB's] finding of no violation is erroneous."

In arriving at his decision, the MSPB presiding official considered testimony of three people, documents submitted by the parties, and deposition testimony of Shear. However, the administrative record does not appear to have been filed with the district court. From the district court's brief discussion on the merits, it is not clear what materials the district court had before it.

From our review of the decision of the MSPB and the few supporting documents provided in "Plaintiff's Exhibits," CR 38, we conclude that the district court was correct. The MSPB presiding official stated that he heard testimony and reviewed documents furnishing evidence "beyond any contradiction" of "extensive, recurrent reorganizations" in the agency in which hundreds of positions were eliminated. The presiding official concluded:

> The evidence is compelling that a "reorganization" within the meaning of 5 C.F.R. 351.203(f) occurred. The evidence clearly established that there was a planned elimination of duties as well as a redistribution of functions in the organization which occurred on a nationwide basis. The evidence also established, as noted, that this current reorganization took place in the context of a series of reorganizations in the recent past and a continuing reduction in agency staffing.

We affirm the district court's grant of summary judgment for the defendant on this claim.

AFFIRMED.

APPENDIX B

UNITED STATES DISTRICT COURT

NORTHERN DISTRICT OF CALIFORNIA

HAROLD J. ROMAIN,
Plaintiff,

v.

ADMIRAL HAROLD SHEAR, Administrator of the DEPARTMENT OF TRANSPORTATION, MARITIME ADMINISTRATION,
Defendant.

No. C-84-4423-WWS

ORDER

Plaintiff Harold Roamin brings this action against defendant Admiral Harold Shear, Administrator of the Department of Transportation, Maritime Administration, sued in his official capacity. Plaintiff, a former Supervisory Trade Specialist for the Maritime Administration, was separated from his job by a reduction in force ("RIF") in 1983. He alleges that the RIF violated the Civil Service Reform Act of 1978, 5 U.S.C. § 7702 *et seq,* the Age Discrimination in Employment Act (ADEA), 29 U.S.C. § 633a, and the Merchant Marine Act, 46 U.S.C. § 1101, as amended, 46 U.S.C. § 1213. Defendant moves to dismiss pursuant to Fed. R. Civ. P. 12(b)(1) all plaintiff's claims on the ground that the complaint was not timely filed, and the ADEA claims on the ground that they were not brought against

a proper defendant. Defendant moves to dismiss plaintiff's Maritime Act claim pursuant to Fed R. Civ. P. 12(b)(6). Finally, defendant moves for summary judgment on plaintiff's Civil Service Act claim on the ground that the decision of the Merit Systems Protection Board satisfies the applicable standard of review under 5 U.S.C. § 7703(c). Plaintiff cross-moves for partial summary judgment on the ADEA claims.

FACTS

Plaintiff was employed by the Department of Transportation, Maritime Administration, Western Region, as a Supervisory Trade Specialist in the San Francisco Regional Office, from October 14, 1973, until his separation by RIF on September 30, 1983. All four Marketing Development and Port positions in the San Francisco Regional Office, including plaintiff's position, were abolished as part of an agency reorganization. A new Maritime Administration Office was opened in Portland, Oregon, in February, 1983, and an employee from the San Francisco office, younger than plaintiff, was assigned to be the Supervisory Trade Specialist in Portland.

On October 20, 1983, plaintiff appealed the RIF to the Merit System Protection Board (MSPB). He alleged that the RIF was conducted in violation of 5 C.F.R. 351.201(a), the regulation governing agency reorganizations. He also alleged that his separation was a pretext for age discrimination, against him both individually and as part of the group of older workers whose positions were abolished in the San Francisco office. In addition, at the MSPB hearing, he argued that the RIF violated the Maritime Act of 1936 by reducing the vitality of the western region in contravention of the Act.

The MSPB found no violations of 5 C.F.R. 351 or the Maritime Act. Instead, the MSPB found "compelling" evidence that a legitimate reorganization and reduction in staffing had been occurring in the agency nationwide since 1981. As to plaintiff's age discrimination claims, the MSPB noted that at the hearing, plaintiff did not allege any individual discrimination, but alleged only adverse impact on older workers as a group. The MSPB concluded that plaintiff failed to establish a prima

facie case of discrimination, citing *Griggs v. Duke Power Company,* 401 U.S. 424 (1971). Moreover, the MSPB noted that the agency had amply demonstrated reasons of business necessity for the RIF, rebutting any prima facie case that plaintiff could establish.

Plaintiff petitioned the MSPB for review of the decision. He noted that since the initial MSPB hearing, the agency was considering hiring a market development consultant in San Francisco on a part-time basis to perform tasks previously conducted by plaintiff in his capacity as a Supervisory Trade Specialist. Plaintiff argued in his petition that this action contradicts the agency's assertion that plaintiff's separation was a business necessity. On May 25, 1984, the MSPB issued a final decision rejecting plaintiff's petition. Plaintiff commenced his action in this Court on June 29, 1985.

DISCUSSION

I. ADEA

Plaintiff's first and second claims allege that by implementing the RIF, the Maritime Administration discriminated against him both individually and as part of the group of older workers in the San Francisco Regional Office. Defendant argues that the ADEA claims must be dismissed on the ground that plaintiff has not named the Secretary of Transportation, who is the proper defendant under the ADEA.

Unlike Title VII of the Civil Rights Act, as amended, which specifically provides that the only proper defendant in a discrimination action brought by a federal employee against his employer is the head of the agency employing the plaintiff, 42 U.S.C. § 2000e-16(c), the ADEA does not specify who is the proper defendant in an action brought under the statute. However, recognizing the similarity of purpose of the ADEA and Title VII, the Supreme Court instructed that when the source of one section of the ADEA can be traced to a complimentary section in Title VII, the two should be construed consistently. *Oscar Mayer & Company v. Evans,* 441 U.S. 750, 756 (1979). In 1974, the ADEA was expanded in scope to include federal employees. An entirely separate section, § 15,

29 U.S.C. § 633a, was added to cover federal employees. *Lehmen v. Nakshian,* 453 U.S. 156, 168 (1981). The Supreme Court observed in *Nakshian* the §§ 15(a) and (b) of the ADEA, as offered by Senator Bensten, the principal sponsor of § 15, and as enacted, are patterned directly after §§ 717(a) and (b) of Title VII, 42 U.S.C. §§ 2000e-16(a) and (b), which extended Title VII protection to federal employees. Defendant assumes that 42 U.S.C. § 2000e-16(c), identifying the proper defendant in a Title VII action, also correlates to the ADEA. Plaintiff does not dispute this position, nor does the Court find any reason for doing so.[1]

42 U.S.C. § 2000e-16(c) provides that an aggrieved party "may file a civil action . . . in which civil action the head of the department, agency or unit, as appropriate, shall be the defendant." Defendant argues that because the Maritime Administration is part of the Department of Transportation, 46 U.S.C. §§ 1111, 1114, 1224(c), the Secretary of Transportation is the only proper defendant. Plaintiff, on the other hand, argues that the Maritime Administration is properly an "agency" within the meaning of the provision.

The problem of whether a particular government entity constitutes a department, agency, or unit within § 2000e-16(c) was considered in *Stephenson v. Simon,* 427 F.Supp. 467 (D.D.C. 1976). The court based its analysis on the statute itself, stating:

> [I]t is necessary to look to the other subsections of [42 U.S.C.] § 2000e-16 to determine the meanings of the terms "department," "agency," and "unit." Even a cursory reading of the entire section reveals that the definitions of these terms in subsection (a) of § 2000e-16 were clearly intended by Congress to be incorporated in subsection (c). Thus, the term "department" means "military departments

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[1] At least four district courts which have considered the issue held that the proper defendant in an ADEA case is the head of the agency that took the personnel action against the plaintiff, or the United States itself. *Gillespie v. Helms,* 559 F.Supp. 40, 41-42 (W.D.Mo. 1983); *Bechtel v. United States Office of Personnel Management,* 549 F.Supp. 111, 113 (N.D.Ga. 1982); *Nelson v. Williams,* 25 FEP Cases 1214, 1216 (D.D.C. 1981); *Carter v. Marshall,* 457 F. Supp. 38, 41 (D.D.C. 1978).

as defined in section 102 of Title 5," "agency" means "executive agencies . . . as defined in section 105 of Title 5," and "unit" means "those units of the District of Columbia having positions in the competitive service, and . . . those units of the legislative and judicial branches of the Federal Government having positions in the competitive service."

* * *

The definition of "executive agencies" as provided in 5 U.S.C. § 105 (1970), and as incorporated in § 2000e-16, is "an Executive Department, a Government corporation, [or] an independent establishment." Again, it is necessary to look to other statutory sections for definitions of the component terms of § 105.... Section 101 of 5 U.S.C. (1970), defines "Executive department" by listing the 11 Cabinet-level departments, [of which the Department of Transportation is one.] Section 104 of 5 U.S.C. (1970), defines "independent establishment" as "an establishment in the executive branch . . . which is not an Executive department, military department, Government corporation, or part thereof...."

Id. at 470.

Applying this statutory analysis, the Maritime Administration is part of the Department of Transportation, an executive agency, and is not in itself an "independent establishment" nor is it a Government corporation. Thus, the Maritime Administration is not a "department, agency or unit" within the meaning of § 2000e-16, and, accordingly, Admiral Shear, as Administrator of the Maritime Administration, is not a proper defendant in this case.

Plaintiff attempts to salvage the complaint by relying on *Rice v. Hamilton Air Force Base Commissary,* 720 F.2d 1082 (9th Cir. 1983), in which the Ninth Circuit reversed the trial court decision that plaintiff failed to timely file his Title VII action and to name the proper defendant. Plaintiff, a pro se litigant, filed a request for appointment of counsel within thirty days of his receiving the EEOC right to sue letter. The request

named "Hamilton AFB Commissary" as the employer. Attached to the request were copies of documents issued by both the EEOC and the Secretary of the Navy in their separate dispositions of plaintiff's claims.

The district court concluded that a "complaint" had not been filed within the jurisdictional period, and that the proper defendant in the suit was the Secretary of the Navy. Since the "caption" of plaintiff's filing did not name the proper defendant, the district court felt required to dismiss plaintiff's filing even if it could have been construed as a complaint. Moreover, since the United States was not given actual notice of the suit within the jurisdictional period, the misnomer could not be corrected pursuant to Fed. R. Civ. P. 15(c).

The appellate court noted, first, that the plaintiff was proceeding pro se and was "weak in both legal knowledge and basic language skills." *Id.* at 1084. The court stated that in such a case "Title VII should not be unnecessarily interpreted in an overly technical fashion that will prevent an adjudication on the merits." *Id.* The court concluded that plaintiff had filed an action sufficient within the meaning of § 717 of Title VII when he filed within the statutory period a request for counsel and a description of his claim.

As to naming the proper defendant, the court acknowledged that an improper defendant was named at the top of plaintiff's filing. This deficiency, however, did not compel a finding that the proper defendant had not in fact been named. "Rather, a party may be properly in a case if the allegations in the body of the complaint make it plain that the party is intended as a defendant." *Id.* at 1085. Since plaintiff attached the EEOC right to sue letter naming the Secretary of the Navy as the responding party, and attached the Secretary of the Navy's disposition of plaintiff's claim, the court concluded that a reading of the filing made clear that the Secretary of the Navy was being sued for employment discrimination.

Plaintiff here argues that he attached to his complaint copies of the MSPB decision naming the Department of Transportation as the responding party and that it is plain from reading these attachments that the Secretary of Transportation was being sued for employment discrimination.

Plaintiff's reliance on *Rice* is misplaced. First, plaintiff here, unlike Rice, submitted a complaint which nowhere mentions the Secretary of Transportation. Second, the *Rice* court makes clear its intention not to construe § 717(c)'s requirement of a proper defendant "as a trap for the unwary pro se litigant." *Id.* The court noted specifically that the requirement allows the dismissal of defendants sued improperly, but cautioned that the requirement "has not been employed as a method of nonsuiting pro se plaintiffs." *Id.* at 1086. Unlike the plaintiff in *Rice,* plaintiff here was represented by adequate counsel.

At the hearing, plaintiff made a second argument in support of his position that he named the proper defendant. On July 2, 1984, plaintiff mailed a copy of the complaint to Peter Hannums, an attorney in the Maritime Administration, as well as to Admiral Shear. Plaintiff argues that service upon Hannums was sufficient to give notice to the Secretary of Transportation. This argument is contrary to Fed. R. Civ. P. 4(d)(5), which governs service of process upon an officer of the United States. Rule 4(d)(5) provides, in pertinent part, that service shall be as follows:

> Upon an officer . . . of the United States, by serving the United States and by sending a copy of the summons and of the complaint by registered or certified mail to such officer . . . .

In cases covered under Rule 4(d)(5), service must be made on the United States in the manner provided in Rule 4(d)(4), and, in addition, a copy of the summons and complaint must be sent to the officer who is the defendant. 2 Moore, *Moore's Federal Practice,* ¶ 4.29 at 4-307. A copy of the summons and complaint was never sent to the Secretary of Transportation. While plaintiff did effect service upon the United States in compliance with Rule 4(d)(4), service was not effected until August 13, 1984, a month and a half after the statutory period expired.[2]

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[2] Plaintiff states in his Reply Brief, p. 5, that the government stipulated to receiving actual notice of the action and service in complaince with Rule 4, citing to the Joint Status Conference Statement, filed September 18, 1984. The government never signed this joint status conference statement and,

(Footnote continued on next page)

Finally, plaintiff argues that even if he failed to name the proper defendant, the defect may be cured by amending the complaint pursuant to Fed. R. Civ. P. 15(c). The Ninth Circuit recently addressed this precise issue in *Cooper v. United States Postal Service,* 740 F.2d 714 (9th Cir. 1984). Title VII gives federal employees thirty days after receiving notice of final agency action on their claims to file suit. One day before the statutory limitation period expired, plaintiff filed a Title VII complaint naming only the United States Postal Service as the defendant. The court held that under the provisions of § 2000e-16(c), the Postmaster General was the proper defendant. The court concluded that plaintiff could not rely on Fed. R. Civ. P. 15(c) to amend her complaint to name the proper defendant. Rule 15(c) provides in part:

> An amendment changing the party against whom a claim is asserted relates back if the foregoing provision is satisfied and, within the period provided by law for commencing the action against him, the party to be brought in by amendment (1) has received such notice of the institution of the action that he will not be prejudiced in maintaining his defense on the merits. . . .

The *Cooper* court cautioned that the Ninth Circuit adheres to a literal interpretation of rule 15(c)'s notice requirement. Strictly interpreting the rule, the Postmaster General could not be substituted as the defendant because he did not "receive such notice of the institution of the action" "within the period provided by law for commencing the action against him." 740 F.2d at 717. Applying the Cooper analysis here, plaintiff is precluded by Rule 15(c) from amending his complaint to name

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(Footnote continued from previous page)

instead, filed a separate status conference statement on March 15, 1985, challenging plaintiff's failure to name the proper defendant and asserting plaintiff's inability to amend his complaint. Moreover, the fact that the United States received actual notice is not sufficient to aid plaintiff here, see Fed. R. Civ. P. 15(c), in light of the fact that the United States was not served until a month and a half after the statutory period had expired. This precise issue was addressed in *Cooper v. United States Postal Service,* 740 F.2d 714 (9th Cir. 1984). The court stated that "Cooper could have preserved her Title VII action by serving a copy of the complaint on either the United States Attorney or the Attorney General before [the expiration of the statutory period]. She failed to do so." 740 F.2d at 717. The *Cooper* plaintiff did not serve the United States until a month after the statutory period had expired.

the Secretary of Transportation as the proper defendant since no notice of the action was given to the Secretary within the statutory period.

Nor can plaintiff argue that service of process upon Hannums or Shear was sufficient to "impute" notice of the institution of the action to the Secretary, thereby allowing plaintiff to amend his complaint under Fed. R. Civ. P. 15(c). This argument was also considered and rejected by *Cooper,* where plaintiff argued that a "community of interest" existed between the Postal Service and the Postmaster General sufficient to impute notice to the Postmaster. The *Cooper* court stated that "even assuming a 'significant community of interest' between the Postmaster General and the governmental parties who were eventually served, Cooper failed to give any of them notice of her action within the statutory period established by 42 U.S.C. § 2000e-16(c). She thus may not now assert ... imputed notice ...." 740 F.2d at 717.

Plaintiff attempts to distinguish *Cooper* by noting that the *Cooper* plaintiff failed to serve *any* individual, much less the proper defendant, within the statutory period. Here, by contrast, two individuals were served with copies of the complaint. Plaintiff is in error. The complaint was filed on the last day of the statutory period.[3] Copies of the complaint were sent by regular mail to Admiral Shear and Hannums five days later on July 2, 1984. The United States was not served until August 13, 1984, almost a month and a half after the statutory period expired. This is exactly the situation in *Cooper*—the complaint was timely filed, but no parties were served within the statutory period.

The court noted expressly that its interpretation of Rule 15(c), read in conjunction with brief statutes of limitation, is quite stringent. It remarked that the Second, Fifth and Sixth Circuits have determined that rule 15(c) cannot be read literally to require notice to the substitute party within the

[3] Plaintiff was required to file his complaint within thirty days of receiving the MSPB final decision. 5 U.S.C. §7703(b)(2). He filed his complaint on June 29, 1984. While the parties disagree as to the date on which plaintiff received the MSPB decision, the Court will view the facts in the light most favorable to plaintiff, thereby accepting May 30, 1984, as the date of receipt. The statutory period thus expired on June 29, 1984.

statutory limitation period. *Cooper* rejected this approach, choosing instead to align with those courts literally applying rule 15(c)'s strict notice requirement. *Cooper* cited *Stewart v. United States*, 655 F.2d 741, 742 (7th Cir. 1981), in which the Seventh Circuit stated:

> Having elected to file suit on the last day of the limitation period, plaintiff requests us to add to that period a "reasonable time" for service of process. We cannot expand [the statutory limitation period] established by Congress. Moreover, application of Rule 15(c) to the Government in the absence of proper notice within the limitation period would result in prejudice by eliminating the statute of limitation defense.

As in *Stewart*, plaintiff here elected to file his suit on the last day of the statutory period. Allowing plaintiff to amend his complaint under rule 15(c) on the basis of imputed notice from Hannums to Shear, both of whom received notice after the statutory period had expired, would be in direct conflict with the *Cooper* holding.

While acknowledging the severe effect of its ruling, the *Cooper* court defended its holding:

> We recognize that our literal interpretation of rule 15(c) and the short limitations period established by 42 U.S.C. §20003-16(c) combine to produce a seemingly harsh result in this case. Such apparently harsh results in individual cases, however, may be the inevitable corollary of our obligation in all cases to follow precedent and to implement controlling statutes and procedural rules. We may ignore neither the limitations on the filing of Title VII actions contained in section 2000e-16(c) nor the notice requirement for the substitution of parties in amended pleadings established by the plain language of rule 15(c). Whatever hardship these combined provisions work on Title VII plaintiffs can be alleviated only by Congress and the drafters of the Federal Rules of Civil Procedure.

740 F.2d at 717.

As plaintiff failed to name the proper defendants in the complaint, and there is no basis on which he can amend the complaint pursuant to Fed. R. Civ. P. 15(c), plaintiff's first and second claims are dismissed with prejudice.

Because the Court disposes of plaintiff's ADEA claims on jurisdictional ground, plaintiff's motion for partial summary judgment is denied. However, the result would be the same on the merits of the motion. As to the disparate treatment theory, plaintiff argues that he has established a prima facie case of age discrimination which cannot be refuted. Defendant, relying on the MSPB finding that the RIF was a legitimate response to agency budget cuts, correctly asserts that a genuine issue of material fact exists regarding plaintiff's discimination claim sufficient to preclude summary judgment. Fed. R. Civ. P. 56(e). Finally, to the extent that plaintiff purports to proceed on a theory of disparate impact, the motion is not supported by any facts, much less undisputed ones.

II. Maritime Act of 1936

Plaintiff alleges in his third claim that the defendant violated the terms of the Maritime Act of 1936, 46 U.S.C. §1101, as amended by §1213, requiring the Secretary of Transportation to establish certain regional offices for the purpose of developing markets and trade. 42 U.S.C. §1213(b). By eliminating plaintiff's position, as well as that of all other market development employees in the San Francisco Regional Office, defendant weakened the vitality of the market development program in the western region.

Plaintiff fails to state a claim upon which relief can be granted. 46 U.S.C. §1101 is simply a declaration of policy which creates no legal rights or duties, much less rights enforceable in a private action. Nothing in 46 U.S.C. §1213(b) mandates maintenance of a regional office in San Francisco. The agency reorganized the western region by opening offices in other cities; it did not abolish the western region.

III. Civil Service Reform Act of 1978

Plaintiff appears to assert in his fourth claim that the agency reorganization which resulted in his separation was not bona fide since it occurred in direct conflict with the goals of the Maritime Act. The reorganization therefore violated the Civil Service Reform Act, 5 U.S.C. §7701.

Initially, the Court notes that plaintiff again failed to name the proper defendant within the thirty day statutory period. 5 U.S.C. §7703, which provides for judicial review of decisions of the MSPB, states in pertinent part: "In review of a final order or decision issued under section 7701, the agency responsible for taking the action appealed to the Board shall be the named respondent." The Department of Transportation was the agency responsible for the reorganization decision and was the named respondent throughout the course of the administrative proceedings. Plaintiff failed to name this defendant.

Even if this Court were to disregard *Cooper* and permit plaintiff to amend his complaint under rule 15(c), plaintiff's claim cannot withstand summary judgment. Where the MSPB has decided "mixed" claims of both discrimination and non-discrimination in accordance with 5 U.S.C. §7702, the Ninth Circuit and other appellate courts hold that both claims must be brought as one action in the district court. *Von Minden v. Nuwes,* No. 80-7764 (9th Cir. April 30, 1981), *cert. denied* 454 U.S. 1032 (1981); *Wermers v. MSPB,* No. 80-7675 (9th Cir. Sept. 9, 1981); *Williams v. Department of Army,* 715 F.2d 1485, 1490 (Fed. Cir. 1983); *Hayes v. United States Government Printing Office,* 684 F.2d 137, 140 (D.C.Cir. 1982); *Chang v. MSPB,* 677 F.2d 173 (1st Cir. 1982); *Wiggins v. United States Postal Service,* 653 F.2d 219 (5th Cir. 1981). Moreover this claim must be reviewed on the basis of the administrative record, not *de novo.* 5 U.S.C. §7703(c); *Hayes v. United States Government Printing Office,* 684 F.2d at 141. See also *Mayo v. Edwards,* 562 F. Supp. 907 (D.C.Cir. 1983); *Gutierrez v. FAA,* No. L-82-9 (S.D.Tex., June 2, 1983).

Plaintiff's argument is that his separation by the Department of Transportation is invalid because the agency reorganization was "not in accordance with law," i.e., the Maritime Act,

5 U.S.C. §7703(c)(1), in that his position was eliminated in violation of the Congressional mandate to maintain a vital market development program in the western region.

The MSPB found no violation of the Merchant Marine Act. It held the reorganization to have been a legitimate action taken in response to lowered personnel ceilings and budget cuts, and conducted in accordance with the regulations at 5 C.F.R. 351. Nothing before the Court suggests that the finding of no violation is erroneous. *See Local 2855, AFGE v. United States,* 602 F.2d 574, 583 (3rd Cir. 1979). Plaintiff has therefore failed to show that the reorganization resulting in the RIF "was not in accordance with law."

For the reasons stated, plaintiff's first three claims are dismissed with prejudice. Defendant's motion for summary judgment on the fourth claim is granted. Plaintiff's motion for partial summary judgment is denied.

IT IS SO ORDERED.

DATED: April 24, 1985.

WILLIAM W. SCHWARZER

William W. Schwarzer
United States District Judge

APPENDIX C

UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

HAROLD J. ROMAIN,
Plaintiff-Appellant,

vs.

ADMIRAL HAROLD SHEAR, Administrator of the DEPARTMENT OF TRANSPORTATION, MARITIME ADMINISTRATION,
Defendant-Appellee.

No. 85-2421

D.C. No. C 84-4423 WWS

ORDER

BEFORE: BROWNING, Chief Judge, FLETCHER and HALL, Circuit Judges.

The panel has voted to deny the petition for rehearing and to reject the suggestion for a rehearing en banc.

The full court has been advised of the suggestion for en banc rehearing, and no judge of the court has requested a vote on the suggestion for rehearing en banc. Fed. R. App. P. 35(b).

The petition for rehearing is denied and the suggestion for a rehearing en banc is rejected.